FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 3, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of KEVIN T. DONALD	:	
	:	
v.	:	Docket No. VA 99-110-DM
	:	
ATLANTIC STATES MATERIALS, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER AND AMENDED DECISION APPROVING SETTLEMENT

BY: Jordan, Chairman; Marks and Verheggen, Commissioners

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 17, 1999, Administrative Law Judge Michael Zielinski issued a Decision Approving Settlement, granting a settlement motion filed by the Secretary in this proceeding. The Secretary now requests the Commission to substitute a corrected motion to approve settlement and to modify the judge's decision.

On June 21, 1999, the Secretary filed a complaint on behalf of Donald alleging a violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). S. Mot. to Substitute Mot. to Approve Settlement at 1 (Feb. 25, 2000) ("S. Substitute Mot."). In her Motion to Substitute, the Secretary states that, on approximately November 10, 1999, the parties "reached an agreement in principle regarding the settlement of this case." S. Substitute Mot. at 2. On November 15, 1999, the Secretary inadvertently filed with the judge a draft motion to approve a settlement agreement, which had not been reviewed by the operator's counsel. *Id.*; *see* S. Mot. to Approve Settlement (Nov. 15, 1999). On November 17, the judge issued his decision approving the settlement and directing Atlantic States to pay the amounts set forth in the settlement agreement. Unpublished Dec. dated Nov. 17, 1999. On February 25, 2000, the Secretary filed an unopposed motion to substitute her November 15 motion to approve settlement, noting that she had mistakenly filed a draft motion, and that Atlantic States had requested various changes to be made, including requiring Donald to sign. S. Substitute Mot. at 2.

The judge's jurisdiction over this case terminated when his decision approving settlement was issued on November 17, 1999. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may

be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The Secretary's motion was received by the Commission on February 28, 2000, about two months after the judge's decision became final. Under these circumstances, we treat the Secretary's motion as a late-filed petition for discretionary review requesting amendment of a final Commission decision. *See Molloy Mining, Inc.*, 22 FMSHRC 292, 293 (Mar. 2000); *General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996).

A final Commission judgment or order may be reopened under Fed. R. Civ. P. 60(b)(1) & (6) in circumstances such as mistake, inadvertence, excusable neglect, or other reasons justifying relief. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *e.g.*, *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). The Secretary inadvertently filed a draft motion to approve settlement with the judge prior to its approval by Atlantic States. The judge entered his decision approving settlement, directing Atlantic States to pay the amounts set forth in the settlement agreement. The amended motion to approve settlement does not materially alter the terms of the agreement set forth in the draft motion. The filing of the draft motion to approve settlement amounts to mistake or inadvertence under Rule 60(b).

Accordingly, we reopen the final decision, and grant the Secretary's motion to substitute her February 25 motion to approve settlement for her November 15 motion.[1] *See Molloy Mining, Inc.*, 22 FMSHRC at 294 (amending judge's decision approving settlement where the Secretary mistakenly listed incorrect amounts for three proposed penalties settled by the parties); *General Chemical Corp.*, 18 FMSHRC at 705 (amending judge's dismissal order where the judge mistakenly left out a citation in the caption and body of his order); *Martin Marietta Aggregates*, 16 FMSHRC 189, 190 (Feb. 1994) (amending judge's decision approving settlement to reflect correct penalty amount agreed to by the parties).

[1] Commissioner Riley concludes that, because the judge committed no error in this matter, this case should be remanded to the judge to allow him to correct the Secretary's clerical error.

Further, it is ordered that the amended motion to approve settlement is granted. The Decision Approving Settlement issued November 17, 1999, is hereby amended to reflect that the Secretary filed an amended motion to approve settlement on February 25, 2000 which accurately represents the settlement agreement between the parties in this discrimination proceeding. The parties shall comply with the terms of the settlement as set forth in the amended Motion to Approve Settlement.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Beatty, dissenting:

I respectfully dissent from the majority's amended decision approving settlement in this case. Consistent with my dissenting opinion in *Secretary of Labor on behalf of Maxey v. Leeco Inc.*, 20 FMSHRC 707 (July 1998), I continue to adhere to my position that this Commission has no authority to approve back pay awards in discrimination cases under section 105(c) of the Mine Act, 30 U.S.C. § 815(c). In my view, the only portion of the Secretary's Motion to Approve Settlement that we have jurisdiction over is found in paragraph 3(d) of the Settlement Agreement regarding the amount of the proposed civil penalty. S. Mot. to Approve Settlement (Feb. 25, 2000) at 3. Since a civil penalty is involved, I would remand this matter to the judge with strict instructions that he only review and approve the language in paragraph 3(d).

I find it interesting in this case that the complainant and the operator have entered into a separate settlement agreement and release to which the Secretary is not a party and whose terms have not been disclosed. If the majority believes that this Commission has the authority to review and approve the terms of back pay settlements in discrimination cases, I question why they would not insist upon disclosure of the terms of this side agreement. Giving their stamp of approval to a settlement agreement without full knowledge of all the terms of the agreement appears to be inconsistent with their position.

Robert H. Beatty, Jr., Commissioner

Distribution

Melonie J. McCall, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Willa Perlmutter, Esq.
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037

Kevin T. Donald
5235 Dickerson Road
Partlow, VA 22534

Administrative Law Judge Michael Zielinski
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041